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LEBRON V. GOTTLIEB AND NONECONOMIC DAMAGES FOR MEDICAL MALPRACTICE LIABILITY: CLOSING THE DOOR ON CAPS, BUT OPENING IT TO NEW POSSIBILITIES

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INTRODUCTION

In May 2005, the Illinois General Assembly succeeded in passing a new tort reform law aimed at addressing a perceived medical malpractice crisis in the state.[1] Officially called "An Act Concerning Insurance," Public Act 94-677 ("P.A. 94-677") reformed medical malpractice law by focusing on legal change, medical discipline, and insurance regulations.[2] One particular reform capped noneconomic damages in medical malpractice and wrongful death actions.[3] Specifically, the statute limited the total noneconomic damages to $1,000,000 for all plaintiffs in a case of an award against a hospital and its personnel or hospital affiliates.[4] In a case of an award against a physician or his business, a corporate entity or personnel, or a health care professional, the cap limited the total amount of noneconomic damages to $500,000.[5]

Just one year later, Abigaile Lebron and her mother, Frances Lebron, filed a medical malpractice action in the Cook County circuit court against Gottlieb Memorial Hospital and two of its medical personnel.[6] The plaintiffs alleged that as a result of certain acts and omissions by the defendants during and after Abigaile's birth, Abigaile suffered from severe brain injury, mental impairment, and inability to develop normal neurological functions.[7] Simultaneously, the Lebrons sought a declaration that the new damage limitations imposed by P.A. 94-677 were unconstitutional.[8] On February 4, 2010, the case reached

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1. 735 ILL. COMP. STAT. ANN. 5/2-1706.5 (West, Westlaw through P.A. 96-1496 of the 2010 Reg. Sess.), *invalidated by* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010).
2. *Id.*
3. *Id.* at (a)(1).
4. *Id.*
5. *Id.* at (a)(2).
6. *Lebron*, 930 N.E.2d at 899.
7. *Id.* at 900.
8. *Id.*

the Supreme Court of Illinois. The Court found in favor of the Lebrons, holding that the cap on noneconomic damages was unconstitutional because it violated the Illinois Constitution's separation of powers clause.[9]

Many other state supreme courts have addressed the constitutionality of statutory caps on noneconomic damages. These courts have based their decisions on various grounds; some jurisdictions focus on the special legislation doctrine, others explore challenges based on the right to a jury trial, a few focus on equal protection, and still others use a due process analysis.[10] The Illinois Supreme Court, however, solely utilized the remittitur doctrine to come to its conclusion.[11]

This case comment addresses the *Lebron* decision and its rationale, particularly its focus on the remittitur doctrine. Additionally, this comment addresses the following concepts: 1) the background and history of attempts to limit common law liability in tort law in Illinois; 2) the remittitur doctrine; 3) other jurisdictions' responses to statutory caps; 4) the majority's distinctions regarding the General Assembly; and 5) alternatives to the tort system of medical malpractice liability which might receive more attention after *Lebron*.

I. BACKGROUND AND HISTORY OF THE HEALTH CARE CRISIS IN ILLINOIS

A. Prior Medical Malpractice Insurance Crisis and Subsequent Legislation

In the years prior to 1975, Illinois underwent a perceived medical malpractice insurance crisis.[12] In response, the Illinois General Assembly enacted legislation limiting medical malpractice recovery, particularly noneconomic damages.[13] The legislation implemented a $500,000 maximum recovery for injuries resulting from "medical, hospital, or other healing art malpractice."[14] One year after the legislation was passed, Jean Mary Wright brought action in the circuit court of Cook County against Central Du Page Hospital Association.[15]

9. *Id.* at 917.

10. *See generally* Carolyn Victoria J. Lees, *The Inevitable Reevaluation of Best v. Taylor in Light of Illinois' Health Care Crisis*, 25 N. Ill. U. L. Rev. 217, 225 (2005).

11. *Lebron*, 930 N.E.2d at 901.

12. Lees, *supra* note 10, at 224.

13. *Id.*

14. 73 ILL.REV.STAT. § 401(a) (West 1975), *invalidated by* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976).

15. *Id.*

Wright sought to recover damages from the hospital and some of its medical personnel for personal injuries suffered while she was confined to the hospital as a patient.[16] In the plaintiff's complaint, Wright challenged multiple provisions of the new legislation, including the cap on noneconomic damages.[17] The case ultimately reached the Illinois Supreme Court, which found that the $500,000 cap violated the Illinois Constitution under the equal protection and due process clauses.[18]

After considering several other provisions of Public Act 79-960, the Court began its analysis of the fourth section, which limited the maximum recovery for medical malpractice injuries.[19] Wright argued that by denying recovery for losses in excess of $500,000, the General Assembly had arbitrarily classified and unreasonably discriminated against the most seriously injured victims of medical malpractice.[20] Citing a previous case that dealt with the Illinois Wrongful Death Act, the defendants countered that the General Assembly could set limits on recoveries—even if the result was to deny certain plaintiffs full compensation for their injuries.[21] The Court rejected the defendants' arguments, noting that the medical malpractice limitation was distinguishable because the action for medical malpractice had a common law basis.[22] According to the majority, when the legislature creates the right and the remedy for an action, it has the authority to limit those remedies.[23] When the right arises from the common law, however, the General Assembly does not possess the same privilege.[24] In addition, the Court found that the limitation arbitrarily limited recovery in actions for medical malpractice, thereby granting a special privilege for certain tortfeasors in violation of the Illinois Constitution.[25]

B. Best v. Taylor and the Illinois Tort Reform Acts of 1995

Despite the result in *Wright*, Illinois legislators again attempted to enact tort reform in the early 1990s.[26] In 1995, the legislature signed

16. *Wright*, 347 N.E.2d at 737.
17. *Id.*
18. *Id.* at 744.
19. *Id.* at 741.
20. *Id.*
21. *Id.*
22. *Id.* at 741–742.
23. *Id.*
24. *Id.*
25. *Id.* at 743.
26. *See* Lees, *supra* note 10, at 225.

into law the Civil Reform Amendments of 1995.[27] The legislation covered several areas of tort law, including products liability, joint and several liability, jury instructions, and damages.[28] The damages provision, however, remained the biggest source of debate and critique. The provision introduced a statutory cap for both punitive and noneconomic damages, which the Act defined as "damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society."[29] Specifically, the noneconomic damages provision limited recovery to $500,000 per plaintiff in any of the actions listed in the Amendments.[30]

In *Best v. Taylor Machine Works*, plaintiff Vernon Best challenged the constitutionality of the Civil Justice Reform Amendments of 1995.[31] Best, after suffering an accident while operating a forklift, brought a products liability action against the forklift manufacturer and a hydraulic fluid manufacturer.[32] Best sought noneconomic damages in excess of $500,000, asserting that he suffered severe and disfiguring injuries and that he would continue to suffer grievous pain and anguish.[33] The circuit court consolidated the case with a separate case, in which the estate of a deceased truck driver brought a negligence suit against the owner and operator of the train that killed him.[34] The Madison County circuit court found that fifteen specific provisions of the Civil Justice Reform Amendments were unconstitutional.[35]

The Illinois Supreme Court, on appeal, focused heavily on the $500,000 cap on noneconomic damages. The defendants characterized the Act as "a legitimate reform measure that is within the scope of the Illinois General Assembly's power to change the common law, shape public policy, and regulate the state's economic health."[36] On the other side, the plaintiffs argued that the reforms erected arbitrary barriers to meritorious claims, and that the Act violated several provisions of the Illinois Constitution: the special legislation clause, the equal protection and due process clause, the separation of powers clause, the right to

27. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)-(e) (West, Westlaw through P.A. 96-1496 of the 2010 Reg. Sess.), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1063 (Ill. 1997).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Best*, 689 N.E.2d at 1062-1063.

32. *Id.* at 1064.

33. *Id.*

34. *Id.*

35. *Id.* at 1065.

36. *Id.* at 1063.

jury clause, and the right to a certain remedy.[37] After a lengthy analysis, the Court concluded that the Act violated the Illinois Constitution's special legislation and separation of powers clauses.[38]

The Court began its analysis of the damages cap by examining the Illinois Constitution's prohibition on special legislation.[39] The specific clause provides that the General Assembly "shall pass no special or local law when a general law is or can be made applicable."[40] This provision prohibits the General Assembly from conferring, without a sound and reasonable basis, a special benefit or privilege on a person or group of persons to the exclusion of others similarly situated.[41] Under this standard, a court must determine whether the state's statutory classification is rationally related to a legitimate state interest.[42] Applying this test, the court found that that the statutory cap was irrational and not legitimately related to the state's proclaimed interest in reducing the systemic costs of tort liability.[43]

Next, the court analyzed the plaintiff's argument that the damages cap violated the Illinois Constitution's separation of powers clause.[44] The clause holds that "the legislative, executive, and judicial branches are separate" and that "no branch shall exercise powers properly belonging to another."[45] Best argued that the statutory cap "improperly delegat[ed] to the legislature the power of remitting verdicts and judgments, which is a power unique to the judiciary."[46]

Under the remittitur doctrine, the judiciary retains the power, in limited circumstances, to correct an excessive jury verdict by reducing a damage award.[47] The plaintiff must consent, or the court will order a new trial.[48] Generally, a damage award "will be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice."[49] The court noted that the practice of or-

37. *Id.*
38. *Id.* at 1064, 1106.
39. *Id.* at 1069.
40. ILL. CONST. of 1970, art. IV, § 13.
41. Petition of the Vill. of Vernon Hills, 658 N.E.2d 365, 367 (Ill. 1995).
42. *Id.*
43. *Best*, 689 N.E.2d at 1077. The court cited three types of such irrational discrimination: discrimination between individuals slightly and severely injured; discrimination among individuals with identical injuries; and discrimination among types of injuries. *Id.*
44. *Id.* at 1078.
45. ILL. CONST. of 1970, art. II, § 1.
46. *Best*, 689 N.E.2d at 1078.
47. *Id.* at 1079.
48. *Id.* at 1080.
49. *Id.* at 1079.

dering a remittitur "has long been recognized and accepted as part of Illinois law" and that it prompts "the administration of justice and the conclusion of litigation."[50] The majority concluded that the statutory cap functioned as a "legislative remittitur" by overriding the jury's careful deliberative process without regard to the specific circumstances of a particular plaintiff's injuries.[51]

Critics of the decision in *Best* attacked the majority's holding on several grounds. Many argued that the damage caps, rather than acting as a legislative remittitur, merely set an outer parameter by which wholly subjective damages would be limited.[52] Such opponents asserted that the General Assembly has the right to change or alter the common law if that change is rationally related to a legitimate state interest.[53] To critics, the heightened medical malpractice insurance crisis constituted such a legitimate state interest.[54] Critics also claimed that *Best*'s holding impaired the legislature's role to evaluate and determine issues of public policy.[55] Despite the criticism, however, the Illinois Supreme Court's holding remained intact for almost a decade.

C. *A New Cap: Public Act 94-677*

In 2004, new legislative efforts to reform tort law emerged. Proponents of reform argued that medical malpractice litigation greatly increased the premiums for malpractice insurance and forced many physicians to leave Illinois.[56] Critics questioned the extent of the crisis as well as the effectiveness of damage caps as a means of addressing the high malpractice insurance premiums.[57] Eventually, the Illinois General Assembly sided with the proponents, passing Public Act 94-677 on May 23, 2005.[58]

Unlike the Civil Justice Reform Amendments of 1995, which were aimed at several areas of tort law, Public Act 94-677 focused only on medical malpractice law.[59] The Act capped noneconomic damages, but

50. *Id.*
51. *Id.* at 1080.
52. Lees, *supra* note 10, at 231.
53. *Id.* at 230.
54. *Id.*
55. *Id.* at 232.
56. *Id.*
57. David Goldhaber & David J. Grycz, *Illinois Adds Fuel to the Fiery National Healthcare Debate: Supreme Court Strikes Damage Caps and Other Healthcare Reforms*, 22 HEALTH LAW., no. 5, June 2010 at 19.
58. *See id.*
59. *See id.*

did not include any caps for punitive damages.[60] The Act declared that "in a case of an award against a hospital and its personnel or hospital affiliates," the total noneconomic damages were limited to $1,000,000 for all plaintiffs in any civil action arising out of the care of the hospital personnel or affiliates.[61] In a case of an award against a physician or his business, a corporate entity and personnel, or a health care professional, the reform limited the total amount of noneconomic damages to $500,000 for all plaintiffs in any civil action arising out of the care of such entity.[62]

The General Assembly cited several reasons and underlying rationales for passing Public Act 94-677. Among those reasons, the General Assembly listed:

> (1) The increasing cost of medical liability insurance results in increased financial burdens on physicians and hospitals.
>
> (2) The increasing cost of medical liability insurance in Illinois is believed to have contributed to the reduction of the availability of medical care in portions of the State and is believed to have discouraged some medical students from choosing Illinois as the place they will receive their medical education and practice medicine.
>
> (3) The public would benefit from making the services of hospitals and physicians more available.
>
> (4) This health care crisis, which endangers the public health, safety, and welfare of the citizens of Illinois, requires significant reforms.

P.A. 94-677, Art. 1, § 101.[63] Despite the consideration and research that went into Public Act 94-677, the reforms were not destined to last very long.

II. *LEBRON V. GOTTLIEB:* THE DEATH OF PUBLIC ACT 94-677

A. Case Background and Amicus Curiae Briefs

In November 2006, plaintiffs Abigaile Lebron and her mother, Frances Lebron, filed a medical malpractice and declaratory judgment

60. *See id.*

61. 735 ILL. COMP. STAT. ANN. 5/2-1706.5(a)(1).

62. *Id.* at (a)(2). This amount, $500,000, was the same amount of the cap for noneconomic damages that was listed in the Civil Justice Reform Amendments of 1995. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)-(e). Other provisions of the Act included: a law elevating standards for experts; an extension for "Good Samaritan" immunity for physicians providing free care; and a rule which permitted doctors and hospitals to apologize to patients and their families, and prohibited that apology from being admitted during trial as an admission of liability. Additionally, the Act provided Illinois officials with greater abilities to discipline physicians and amended several portions of the Illinois Insurance Code for medical liability insurers. *Id.*

63. *Id.*

action in the Cook County circuit court against Gottlieb Memorial Hospital and some of its personnel.[64] The Lebrons alleged that Abigaile sustained numerous permanent injuries during her birth at the hospital, including severe brain injury, cerebral palsy, cognitive mental impairment, and the inability to be fed normally.[65] The Lebrons sought a judicial determination of their rights with respect to Public Act 94-677, as well as a declaration that certain provisions of the Act violated the Illinois Constitution.[66] Citing *Best*, the Lebrons argued that the limitation on noneconomic damages violated the separation of powers clause.[67]

Before the case reached the Illinois Supreme Court, several parties filed amicus curiae briefs. The Illinois Hospital Association and other hospital associations filed a brief on behalf of the defendants on May 20, 2009.[68] The hospital associations first argued that P.A. 94-677 represented the Illinois legislature's "careful and constitutional solution to a problem with which nearly every state legislature in the nation has grappled: preserving access to health care in the face of skyrocketing medical liability costs."[69] The hospital associations feared that if the Act were overturned, "unchecked medical liability costs will undoubtedly begin their rapid climb to the disadvantage of all Illinoisans," and that all members of the public would pay the price for this decision.[70]

The hospital associations' brief also maintained that the recovery of noneconomic damages is not "so important that the legislature is constitutionally prevented from imposing generous limitations on the . . . liability of hospitals and physicians."[71] In their view, the alternative position would place the court directly into the role of the legislature—a role for which the court lacks policy-making standards and resources.[72] The associations additionally argued that assessing of the impact of medical liability costs is a legislative task, and that "it is not the role of the judiciary to declare that there is a *better way* to address

64. *Lebron*, 930 N.E.2d at 899.

65. *Id.* at 900.

66. *Id.*

67. *Id.* In particular, they believed that Abigaile's damages for her injuries would greatly exceed the $500,000 cap on noneconomic damages. *Id.*

68. Brief for Ill. Hosp. Ass'n as Amicus Curiae Supporting Defendant-Appellant, Lebron v. Gottlieb Mem'l Hosp. at 3, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

69. *Id.* at 3.

70. *Id.*

71. *Id.* at 5.

72. *Id.*

the problem."[73] Finally, the hospital associations declared that the trial court erred by placing the interests of the plaintiffs over the interests of the public in general.[74]

On the opposite side of the spectrum, the American Bar Association (ABA) and the Illinois AFL-CIO wrote briefs in support of the plaintiffs. According to the ABA, caps on noneconomic damages "discourage lawyers from taking meritorious cases where economic damages are low, and thus, undermine the ability of a significant number of injured persons to seek redress in the courts."[75] The ABA argued that instead of imposing a ceiling on pain and suffering damages, trial and appellate courts should make greater use of the power of remittitur or additur.[76] They also declared that the caps "discriminate against the relatively small number of accident victims who suffer the most devastating physical and psychological injuries."[77]

The Illinois AFL-CIO and the Chicago Federation of Labor, in their brief, focused on the arbitrariness of the cap itself, claiming that "the Legislature picked a number out of a hat."[78] The AFL-CIO also believed that the Act constituted special legislation by conferring a benefit on one group of persons but denying that benefit to others who are similarly situated.[79]

B. The Court's Rationale: Remittitur and Best

Finally, in February 2010, the Illinois Supreme Court reached a decision. The court relied heavily on *Best*, concluding that P.A. 94-677 infringed upon the inherent power of the judiciary to order a remittitur, thereby violating the Illinois Constitution's separation of powers clause.[80] The circuit court had previously determined that the statutory cap operated as a legislative remittitur and focused only on that argument.[81] Therefore, the Illinois Supreme Court considered only a

73. *Id.*

74. *Id.* at 6.

75. Brief for Am. Bar Ass'n as Amicus Curiae Supporting Plaintiffs-Appellees, Lebron v. Gottlieb Mem'l Hosp. at 1, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

76. *Id.* at 3.

77. *Id.* at 4.

78. Brief for Ill. AFL-CIO as Amicus Curiae Supporting Plaintiffs-Appellees, Lebron v. Gottlieb Mem'l Hosp. at 7, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745). The ABA found that the primary impact of damage caps falls on cases involving women, children, and the elderly, especially in death cases involving those groups. *Id.*

79. *Id.* at 3–4.

80. *Lebron*, 930 N.E.2d at 917.

81. *Id.* at 901.

separation of powers challenge without inquiring into any of the plaintiffs' other arguments.[82]

First, the court rejected the defendants' argument that P.A. 94-667 was distinguishable from the statute at issue in *Best*.[83] The Civil Justice Reform Amendments of 1995, at the heart of the problem in *Best*, covered "all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence, or product liability."[84] P.A. 94-677 was limited to "any medical malpractice action or wrongful death action based on medical malpractice."[85] The court restated, however, that the purpose of the separation of powers clause is to "ensure that the whole power of two or more branches of government shall not reside in the same hands."[86] Thus, the legislature "is prohibited from enacting laws that unduly infringe upon the inherent powers of judges."[87] The *Lebron* court concluded that although the scope of the statute at issue in *Best* was much broader than Public Act 94-677, "the encroachment on the inherent power of the judiciary is the same."[88]

The *Lebron* court found fault with Public Act 94-677 primarily because it capped noneconomic damages without regard to the particular facts and circumstances of a case.[89] Under the Act, a court "is required to override the judiciary's deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff's consent."[90] This process "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law."[91] Whereas the court must carefully examine the particular circumstances of a case when utilizing a remittitur, no such deliberative process occurs when applying a damages cap.[92] In addition, a plaintiff traditionally must

82. *Id.* Based on the Act's inseverability provision, the circuit court had invalidated the act in its entirety. *Id.*

83. *Id.* at 907–908.

84. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)-(e).

85. 735 ILL. COMP. STAT. ANN. 5/2-1706.5(a).

86. *Lebron*, 930 N.E.2d at 905 (quoting *Best*, 689 N.E.2d at 1057).

87. *Id.*

88. *Id.* at 908.

89. *Id.*

90. *Id.*

91. *Id.* (quoting *Best*, 689 N.E.2d at 1057).

92. *Id.*

either consent to the remittitur or accept a new trial, but the damage cap from Public Act 94-677 applied unconditionally.[93]

Next, the court addressed the defendants' arguments regarding the authority of the Illinois General Assembly. The defendants declared that since the General Assembly has the right to alter the common law, Public Act 94-677 represented a valid exercise of that power.[94] To support their argument, the defendants cited previous decisions which upheld statutes limiting a plaintiff's damages.[95] In *Unzicker v. Kraft Food Ingredients Corp.*, for example, the Illinois Supreme Court rejected a separation of powers challenge to a provision of the Illinois Code which modified the common law rule of joint and several liability.[96] The majority, however, held that the statute in *Unzicker* "required the court to enter judgment in conformity with the jury's assessment of fault where the defendant was minimally responsible."[97] The statute in *Lebron*, on the other hand, "require[d] the court to enter a judgment at variance with the jury's determination and without regard to the court's duty to consider, on a case-by-case basis, whether the jury's verdict is excessive as a matter of law."[98]

The court also distinguished caps on punitive damages from caps on noneconomic damages. The defendants argued that since the Illinois Supreme Court had previously upheld statutory limits on punitive damages, the cap on noneconomic damages in P.A. 94-677 was valid.[99] Specifically, the defendants cited *Siegall v. Solomon* and *Smith v. Hill*, two cases which dealt with the constitutionality of a cap on punitive damages.[100] In *Smith*, the court rejected a separation of powers challenge to a ban on punitive damages for breach of promise to marry.[101] However, the majority distinguished *Smith* by declaring that "a ban on punitive damages is not akin to a cap on noneconomic damages" because punitive damages are awarded in the interest of society and not to recompose solely an individual.[102]

93. *Id.*

94. *Id.* at 912.

95. *Id.* Defendants also relied upon Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986); Siegall v. Solomon, 166. N.E.2d 5 (Ill. 1960); and Smith v. Hill, 147 N.E.2d 321 (Ill. 1958). In the court's analysis, it distinguished all three cases from Public Act 94-677 because all three dealt with punitive damages, rather than noneconomic damages. *Id.*

96. Unzicker v. Kraft Food Ingredients Corp., 783 N.E.2d 1024, 1043 (Ill. 2002).

97. *Lebron*, 930 N.E.2d at 911.

98. *Id.*

99. *Id.* at 912.

100. *See* Siegall v. Solomon, 166. N.E.2d 5 (Ill. 1960); Smith v. Hill, 147 N.E.2d 321 (Ill. 1958).

101. *Smith*, 147 N.E.2d at 327.

102. *Lebron*, 930 N.E.2d at 912.

The defendants also argued that if Section 2-1706.5 of the Act (the cap on noneconomic damages) was invalidated, other statutes limiting common law liability could not survive.[103] Among others, the defendants mentioned the Good Samaritan Act, the Innkeeper Protection Act, the Emergency Medical Services Systems Act, and the Probation Community Service Act.[104] The court refused to comment on the constitutionality of such legislation, but noted that none of the statutes cited "reduce[s] a jury's award of noneconomic damages to a predetermined limit, irrespective of the facts of the case."[105] The court also declined to comment on other similar legislation in other jurisdictions, but sniped that " 'everybody is doing it' is hardly a litmus test for the constitutionality of the statute."[106]

C. *Dissent: An Attack on Remittitur, Best, and the Lack of Deference to the General Assembly*

In his dissent, Justice Karmeier gave a lengthy opinion in which he questioned several aspects of the majority's rationale.[107] Karmeier argued that the malpractice reforms like P.A. 94-677 might have a "salutary effect" on the perceived national medical malpractice crisis.[108] He also declared that public policy determinations are better left to the legislature, and that the court should grant deference to these determinations.[109] Karmeier then argued that the General Assembly had made progress in tailoring P.A. 94-677 since its last attempt at tort reform, and that this difference rendered the majority's reliance on the *Best* holding inappropriate.[110] The substantive bulk of Justice Karmeier's argument, however, criticized the *Best* decision itself as well as the doctrine of remittitur.[111]

103. *Id.* at 913.

104. *Id.* All of these statutes limit common law liability in various fields, including negligence liability for health care professionals, liability for hotels, and liability for emergency providers of medical services. *See infra,* footnotes 216–229.

105. *Id.*

106. *Id.* The court did note that the statutes cited by defendants from other states varied widely, "not only in the amount of the cap, but in other specifics." It also declared that "although decisions from other jurisdictions can provide guidance . . . we do not write today on a blank slate. Our decision in *Best* guides our analysis." *Id.*

107. *Id.* at 917–922.

108. *Id.* at 917.

109. *Id.* at 920.

110. *Id.* at 927.

111. *Id.* at 927–931.

Justice Karmeier noted that *Best*'s holding—that legislative caps on noneconomic damages offends the separation of powers clause—rests entirely on the idea that caps are a legislative remittitur.[112] The remittitur, he argued, is "not a power specifically vested in the courts by our constitution or the Constitution of the United States."[113] The majority had not explicitly addressed the constitutionality of remittitur, but merely stated that "the application of [the] doctrine has been a traditional and inherent power of the judicial branch."[114] Justice Karmeier, on the other hand, declared that the remittitur doctrine has been challenged as unconstitutional as an abridgement of the right to trial by jury.[115] He also argued that the remittitur "cannot, in any meaningful way, be viewed as an essential component of the judicial power vested in those courts by the Illinois Constitution of 1970."[116]

According to Karmeier, when the legislature imposes a damages cap, it is not the equivalent of a legislative remittitur; a court that reduces the jury award to comply with the cap is simply implementing a legislative policy decision to reduce the amount recoverable to one that the legislature finds reasonable.[117] He claimed that the cap is simply "a determination that a higher award is not permitted as a matter of law" and is "not a remittitur at all."[118] Karmeier also argued that the cap was constitutional because the General Assembly is fully empowered to alter common law remedies.[119] In addition, Karmeier noted that the General Assembly has the authority to simply eliminate all noneconomic damages in medical malpractice cases.[120] If the majority refused to accept a cap, he argued, this drastic measure might become reality and "for those committed to insuring that victims of medical malpractice receive the maximum possible compensation for their injuries, these loom as sobering possibilities."[121]

112. *Id.* at 927.
113. *Id.* at 927–928.
114. *Id.* at 905.
115. *Id.* at 928. He cites to the case of *Dimick v. Scheidt*, which questioned the doctrine's constitutionality. 293 U.S. 474, 484 (1935).
116. *Lebron*, 930 N.E.2d at 928.
117. *Id.* (quoting Estate of Sisk v. Manzanares, 270 F.Supp.2d 1265, 1277–78 (D. Kan. 2003)).
118. *Lebron*, 930 N.E.2d at 928.
119. *Id.* at 931.
120. *Id.* at 933.
121. *Id.*

Finally, Justice Karmeier criticized the majority's quick disregard of similar caps and cases from other jurisdictions.[122] He critiqued the majority's attempts to create "obstacles" to legitimate efforts by the legislature to find an answer to what the legislature deems a serious problem in the health care industry.[123] If the courts exceed their constitutional role, he posited, "they not only jeopardize the system of checks and balances" but they also "put at risk the welfare of the people the government was created to serve."[124]

III. *LEBRON* AND REMITTITUR: A SOLID RATIONALE?

Lebron's majority based its decision primarily on the concept of the remittitur.[125] Some authorities, both before the court's decision and after, have questioned the constitutionality of the doctrine.[126] Nonetheless, many states have upheld the doctrine of remittitur, and some have even used it to strike down statutory caps on noneconomic damages in medical malpractice actions. This section addresses the history of the remittitur doctrine, examines decisions of other states regarding the constitutionality of statutory caps, and briefly looks into some of the problems and criticisms associated with the remittitur doctrine.

A. History of Remittitur

The remittitur doctrine was first recognized in the United States in a case called *Blunt v. Little*.[127] In the opinion, Justice Story stated a court could order a new trial if damages were excessive as a result of gross error on the part of the jury.[128] Justice Story, citing two English cases, declared that "if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as

122. *Id.* at 932. He wrote, "In the matter before us, no one is suggesting that our view of the separation of powers clause of the Illinois Constitution be predicated on anything other than the intent of those who framed and adopted the Constitution. The preeminence of that intent, however, does not preclude reference to how other courts have analyzed similar provisions under similar circumstances." *Id.*

123. *Id.* at 934.

124. *Id.*

125. *Id.* at 910-917.

126. *See* Suja A. Thomas, *Re-examining the Constitutionality of the Remittitur under the Seventh Amendment*, OHIO ST. L. J. 731, 750-760 (2003).

127. 3 F. Cas. 760 (D. Mass. 1822).

128. *Id.* at 762.

much the duty of the court to interfere, to prevent the wrong, as in any other case."[129]

Since this decision, both federal and state courts have recognized the practice of remittitur. In 1886, the United States Supreme Court officially recognized the remittitur in *Northern Pacific R.R. v. Herbert,* where it upheld a lower court's order that the plaintiff, an injured brakeman, remit a portion of his damage award or to consent to a new trial.[130] The court, however, failed to provide a rationale for its holding, merely citing to *Blunt* and a few other cases.[131]

Dimick v. Scheidt, a Supreme Court case from 1935, finally shed some substantive light on the remittitur doctrine.[132] In *Dimick,* the Supreme Court considered the constitutionality of an additur, an increase of a jury verdict, in the context of the Seventh Amendment's right to a trial by jury.[133] Specifically, the Court's analysis dealt with the re-examination clause, or the clause which provides that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."[134] The court declared that a practice was constitutional under a re-examination clause of the Seventh Amendment if it existed at the time the amendment was adopted.[135] Thus, the court looked to whether the practice existed at English common law in 1791.[136]

In its analysis, the Supreme Court found no evidence of additur, but noted that federal courts since *Blunt* had frequently utilized the remittitur doctrine to decrease jury verdicts.[137] The Court was able to cite to a few English common law cases in support of the remittitur, but, finding no precedent for the additur, declared it unconstitutional.[138] In dicta, the Court suggested that courts in the future should not revisit the constitutionality of remittitur.[139] The Court conceded, how-

129. *Id.* Justice Story then ordered that the case be submitted to another jury unless the plaintiff would remit $500 of his damages. *Id.*

130. *Id.*

131. *Id.*

132. Dimick v. Scheidt, 293 U.S. 474 (1935).

133. *Id.* at 475.

134. *Id.* at 476 (quoting U.S. CONST. amend. VII).

135. *Id.* The Seventh Amendment was adopted in 1791.

136. *Id.*

137. *Id.* at 476–488. The court looked at the remittitur as a sort of companion to additur to determine the additur's constitutionality. The defendants had argued that if remittitur was constitutional, the additur should be found constitutional as well. *Id.*

138. *Id.* at 486–487.

139. *Id.* at 484–485.

ever, that "if the question of remittitur were now before us for the first time, it would be decided otherwise."[140]

B. State Court Decisions Regarding Statutory Caps on Noneconomic Damages

Many other states have addressed the constitutionality of caps on noneconomic damages. Plaintiffs have attacked statutory caps on a variety of bases, including violations of the following provisions of a state's constitution: the prohibition against special legislation, the equal protection clause, the guarantee to a trial by jury, the due process clause, and the separation of powers analysis.[141] The state supreme court decisions generally vary widely, but no other state court has relied exclusively on the remittitur doctrine in the same manner as the *Lebron* majority. This section analyzes and compares a few state decisions which have addressed the constitutionality of statutory caps on noneconomic damages.

1. States Upholding Statutory Caps on Damages

One recent case that dealt with statutory caps on noneconomic damages, and came to the opposite conclusion of *Lebron*, is *Gourley v. Gourley*, a Nebraska case decided in 2003.[142] The statute at issue in *Gourley* was the Nebraska Hospital-Medical Liability Act, which provided that the total amount recoverable from all health care providers in a medical malpractice action could not exceed $1,250,000.[143] The Nebraska Supreme Court found that the statutory cap did not constitute special legislation in violation of the state constitution, did not violate principles of equal protection, did not violate the open courts or right to trial by jury provision, and did not act as a legislative remittitur.[144]

The *Gourley* court, in contrast to the *Lebron* majority, advocated the idea of legislative deference and explicitly rejected the idea that the Act constituted a legislative remittitur.[145] "It is not this court's place," the majority held, "to second-guess the Legislature's reasoning behind

140. *Id.* at 485.

141. *See* Matthew M. Light, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE. L. REV. 315, 318-320 (2001).

142. 265 Neb. 918 (Neb. 2003).

143. *Id.* at 937 (citing NEB. REV. STAT. § 44-2801 et seq. (1998)). Section 44-2825 of the Act is discussed in this section.

144. *Id.* at 957.

145. *Id.* at 956.

passing the act."[146] The court noted that the Legislature may abolish a common-law right or remedy, and stated that a cap therefore does not act as a legislative judgment of damages.[147] The court explicitly rejected the rationale in *Best*, declaring that "the cap does not ask the Legislature to review a specific dispute and determine the amount of damdamages."[148] Instead, the majority believed that "the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy."[149]

Another state decision regarding the constitutionality of statutory caps is *Arbino v. Johnson & Johnson*.[150] The Ohio statute at issue in *Arbino*, R.C. 2315.18, held that a court must limit recovery for noneconomic damages at $250,000 or at three times the economic damages determined by the jury.[151] The *Arbino* majority upheld the statute and, like the court in *Gourley*, deferred heavily to legislative judgment.[152] The majority rejected Arbino's separation of powers challenge, but did not mention or address the doctrine of remittitur.[153] The court did hold, however, that the separation of powers argument "lack[ed] merit" because the judicial function of deciding facts in a case "is not so exclusive as to prohibit the General Assembly from regulating the amount of damages available in certain circumstances."[154]

In the Alaska case of *Evans ex rel. Kutch v. State*, the Alaska Supreme Court upheld a statutory cap on noneconomic damages for personal injury cases.[155] The plaintiffs had argued that the legislature, by enacting the cap, usurped the power of the judiciary to remit excessive damages.[156] The Alaska Supreme Court rejected plaintiffs' argument,

146. *Id.* at 943.

147. *Id.* at 956. The court also cited to several decisions from other states (such as Kirkland v. Blaine County Medical Center, 134 Idaho 464, 471 (Idaho 2000)). It explicitly rejected the *Best* decision and noted that it was the only court to hold that a cap on damages improperly delegates to the legislature the power to remit verdicts and judgments. *Id.* at 955.

148. *Id.*

149. *Id.*

150. 116 Ohio St. 3d 468, 468 (Ohio 2007).

151. *Id.* at 474 (quoting OHIO REV. CODE ANN. § 2315.18 (B)(2) (West, through 2010 File 58 of the 128th GA (2009-2010))). The statute does not apply to tort actions in the Court of Claims or to actions for wrongful death, medical or dental malpractice. *Id.* The statute also provided that these limits did not apply if the plaintiff suffered permanent physical deformity, loss of the use of a limb or a bodily organ, or permanent physical injury that prevented him from being able to care for himself independently. *Id.*

152. *Id.* at 491.

153. *Id.* at 483-484.

154. *Id.* at 483.

155. 56 P.3d 1046, 1070 (Alaska 2002).

156. *Id.* at 1055.

declaring that "the damage caps cannot violate the separation of powers, because the caps do not constitute a form of remittitur."[157] The court stated that the legislature has the power to modify or alter the common law, and that this power includes the ability to set reasonable limits on recoverable damages.[158]

2. States Striking Down Statutory Caps as Unconstitutional

Other state decisions, like *Lebron*, have struck down caps on noneconomic damages for medical malpractice actions. However, none of these states have exclusively relied upon the remittitur doctrine to overturn the cap in the same manner as the *Lebron* majority. More commonly, plaintiffs attack statutory caps on violations of right to trial by jury or on equal protection grounds. A recent case in Georgia, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, for example, held that a statute limiting awards of noneconomic damages in medical malpractice cases violated the right to a jury trial.[159]

The relevant Georgia statute provided that in an action for medical malpractice, the total amount recoverable for noneconomic damages was limited to $350,000, regardless of the number of defendants.[160] The Court noted that the amount of damages sustained by a plaintiff is ordinarily an issue of fact, and the right to a jury trial thus includes the right to have a jury determine the amount of damages.[161] The majority held that "by requiring the court to reduce a noneconomic damages

157. *Id.*

158. *Id.* at 1055–1056. The following decisions have adopted a similar rationale in regards to the remittitur and the separation of powers analysis: Polland v. E.I. DuPont de Nemours Co., 213 F.3d 933, 945–46 (6th Cir. 2000), *rev'd on other grounds*, 532 U.S. 843 (2001) (holding that federal Title VII damages cap did not violate separation of powers because Congress created the remedies under Title VII, and may therefore limit them as well); Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1121–22 (Idaho 2000) (holding that noneconomic damages cap did not violate separation of powers because Idaho Constitution grants the legislature the power to modify or abolish common law causes of action); Edmonds v. Murphy, 325 Md. 342 (Md. 1992) (holding that noneconomic damages cap did not violate separation of powers because the legislature has the power to provide for or repeal remedies); Pulliam v. Coastal Emergency Servs. of Richmond, Inc. 509 S.E.2d 307, 319 (Va. 1999) (holding that medical malpractice damages cap did not violate separation of powers, because under Virginia law the legislature "has the power to provide, modify, or repeal a remedy"); Verba v. Ghaphery, 552 S.E.2d 406, 411 (W. Va. 2001) (holding that medical malpractice damages cap did not violate separation of powers because, under West Virginia law, the legislature has the power to alter the common law, and damages cap is mere limitation of common law remedies).

159. 691 S.E.2d 218 (Ga. 2010).

160. *Id.* (quoting GA. CODE ANN. § 51-13-1(c)) (West, through 2010 Reg. Sess.)). The Act also limited noneconomic damage awards against a single medical facility to $350,000 , and limited awards to $1,050,000 for actions against multiple health care providers and medical facilities. *Id.* at (c), (d), (e).

161. *Id.* at 222.

award determined by the jury that exceeds the statutory limit," the Act "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."[162]

In *Moore v. Mobile Infirmary Ass'n.*, the Alabama Supreme Court struck down a statutory cap on noneconomic damages and briefly mentioned remittitur, but only in the context of the right to trial by jury.[163] The Court held that the statute setting a $400,000 limit on noneconomic damages in medical malpractice cases violated the right to trial by jury and the equal protection guarantees under the Alabama Constitution.[164] The Court briefly reviewed remittitur as it had been used in Alabama history, and stated that "the court has often cautioned against interference with a jury's damages assessment unless the particular assessment is flawed by bias, passion, prejudice, corruption, or other improper motive."[165] It continued that "the soundness of a jury's findings on the issue of damages must be evaluated on a case by case basis."[166]

The court then held that the right to trial by jury does cover the right to have a jury make a factual assessment of damages.[167] The Alabama statute violated this right, because when a jury's assessment exceeds the predesignated ceiling, it "allows no consideration for exigencies presented by each case."[168] According to the majority, "such a requirement has no parallel in the jurisprudence of [Alabama] and is patently inconsistent with the doctrines of remittitur or new trial."[169] Thus, although the Court discussed the remittitur doctrine, it was not used as grounds for ruling the caps unconstitutional—as it was in *Lebron*.

162. *Id.* at 223.

163. 592 So.2d 156, 171 (Ala. 1991)

164. *Id.*

165. *Id.* at 161. The defendant had argued that the legislative cap on damages impaired the right to a jury trial no more than traditional forms of judicial supervision, such as the remittitur. The court, however, noted that the remittitur actually does implicate a plaintiff's right to trial by jury. However, the doctrine is permitted because the court only issues remittitur if the verdict is so excessive or inadequate to indicate that it was produced by passion or prejudice or improper motive. *Id.*

166. *Id.* at 162.

167. *Id.* at 163.

168. *Id.* at 163.

169. *Id.*

C. Problems with Remittitur

Despite the *Lebron* majority's reliance on the remittitur, some sources question the doctrine's constitutionality. Since *Dimick*, the Supreme Court has not explicitly ruled one way or another on the constitutionality of the remittitur. Some criticize the *Dimick* decision itself, arguing that under the English common law prior to 1791, the remittitur was not used in the same way that the doctrine is utilized now (which indicates that the remittitur is unconstitutional under a Seventh Amendment analysis).[170] The *Lebron* majority accepted the remittitur doctrine based simply on its continued and uncontested existence in Illinois.[171] Justice Karmeier, on the other hand, attacked the remittitur doctrine and directly questioned its constitutionality.[172] Although it seems that the remittitur will remain intact in Illinois, other states have spent more time grappling with the doctrine's constitutionality.

Some critics have attacked the constitutionality of the remittitur in the context of a plaintiff's right to a trial by jury. For example, a judge ordering the remittitur decides the maximum amount that a jury could have found, and his decision on the matter cannot be appealed.[173] The plaintiff must either accept the remittitur or consent to a new trial, and if the plaintiff accepts the remittitur he loses the right to appeal the issue.[174] At the next trial, the plaintiff will presumably put on the same evidence, and the plaintiff must assume that a judge will reduce damages again if he receives a higher amount than the remittitur. [175] Critics argue that this process effectively destroys a plaintiff's right to have damages determined by a jury.[176]

170. Thomas, *supra* note 126, at 750–760. Thomas argues that at English common law in 1791, the plaintiff proactively used remittitur to cure a defect in the record, rather than being forced to agree to a remittitur instigated by the judiciary. She also notes that English courts could not reduce verdicts with the consent of only one party, and that courts did not state the maximum sum that a jury could find. Those that did use the remittitur only did so if the damages were generally calculable, such as in a contracts case. The courts never used remittitur for a case that had an uncertain damages determination, such as a torts case. In sum, she argues, the federal courts today practice a remittitur that did not have a English common law analogue in 1791. In her view of seventh amendment analysis, this makes the doctrine unconstitutional. *Id.*

171. *Lebron*, 930 N.E.2d at 910–915.

172. *Id.* at 928.

173. *See* Thomas, *supra* note 126, at 739–741. The plaintiff cannot appeal this decision, because it is a final judgment.

174. *Id.*

175. *Id.* Thomas notes that it will be the same judge deciding the second trial, and that judge has already determined that the remitted amount was the maximum under the facts. She believes that a judge will automatically remit the damages if the jury returns a higher amount, or else that judge would have to admit that his previous ruling on the same facts was incorrect. *Id.*

176. *Id.*

One state which had previously abolished the remittitur doctrine has since readopted it by statute. In *Firestone v. Crown Development Corp.*, the Missouri Supreme Court explicitly abolished the remittitur doctrine, holding that the practice of remittitur was not a provision of any statute or rule in the state.[177] The court also claimed that since the doctrine's inception, courts questioned remittitur as an invasion of a party's right to trial by jury and as an assumption of a power to weigh the evidence—a function reserved to the trier of fact.[178] The court abolished the remittitur, noting that a Missouri court could still order a new trial for "good cause" or on the grounds that the verdict was against the weight of the evidence.[179] However, the Missouri legislature reinstated the remittitur by statute just two years after *Firestone*, and the Missouri legislature declined to address any of the Supreme Court's arguments from the case.[180]

IV. *LEBRON'S* RELIANCE ON REMITTITUR: LOOKING TOWARDS THE FUTURE

The *Lebron* majority analyzed the statutory caps on noneconomic damages solely in the context of the separation of powers clause.[181] Although courts such as *Gourley* also discuss the remittitur in relation to statutory caps,[182] no other state court has exclusively relied upon it to strike down tort reform legislation. *Lebron*'s decision indicates that the Illinois Supreme Court will not budge on the issue of statutory caps on noneconomic damages for causes of action that were created by the common law. This section makes the following conclusions: 1) the *Lebron* Court made a sound decision in light of its remittitur analysis; 2) most of the currently enacted Illinois statutes limiting common law liability will survive a separation of powers challenge; and 3) after *Lebron*, the General Assembly might delve into other methods of re-

177. 693 S.W.2d 99, 110 (Mo. 1985) (en banc).

178. *Id.*

179. *Id.* The court then affirmed the verdict of the jury and ordered that the verdict of $15,000,000 be re-instated for the plaintiff. *Id.*

180. *See* MO. ANN. STAT. § 537.068 (West through end of 2010 First Extraordinary Sess. of the 95th Gen. Assembly). The Missouri legislature enacted its remittitur statute on July 1, 1987. The statute provides that "a court may enter a remittitur order if after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds a fair and reasonable compensation for plaintiff's injuries and damages." *Id.*

181. *Lebron*, 930 N.E.2d at 911–917. As noted in this comment, the Lebrons brought several other arguments regarding the caps but the court declined to address these arguments, since the lower court focused only on the remittitur.

182. 265 Neb. 918, 955 (Neb. 2003).

forming medical malpractice liability that do not implicate the remittitur—particularly those involving contract law.

A. *Why the Majority "Got it Right": Distinctions Regarding the Power of the General Assembly*

1. Authority of the General Assembly: Caps vs. Abolishing Causes of Action

The *Lebron* majority correctly concluded that although the General Assembly has the authority to change or alter the common law by abolishing a cause of action, it may not place a cap on noneconomic damages.[183] When the General Assembly eliminates a cause of action entirely, the legislature does not interfere with the powers of the judicial branch. For example, if a potential plaintiff cannot bring a cause of action for noneconomic damages, a jury would never make a determination of noneconomic damages. The remittitur doctrine, then, could never be implicated; there would be no damage award, let alone an excessive award, that the judge could reduce. Thus, although the elimination of a cause of action might implicate other constitutional issues, it would pass a separation of powers challenge.

Critics of *Lebron* argue that instituting a damage cap is no different from abolishing a certain cause of action, because a cap simply eliminates a cause of action for a verdict past a certain number.[184] Justice Karmeier, for example, believes that "reduction of an award to comport with legal limits does not involve a substitution of the court's judgment for that of the jury, but rather is a determination that a higher award is not permitted as a matter of law."[185] This assertion, however, makes little sense in light of the remittitur analysis.

In the first scenario, when the General Assembly eliminates a cause of action, a jury never makes a damages determination. With a statutory damage cap, on the other hand, a jury still determines an amount of damages. If the jury's determination exceeds a certain number ($500,000 under the statute in *Lebron*), the court must automatically reduce it to the set value of the statutory cap. A judge thereby loses the ability to examine the particular facts of the case to determine whether the award was actually excessive as a matter of law.[186] Con-

183. *Lebron*, 930 N.E.2d at 911–917.
184. *See id.* at 930–931.
185. *Id.* at 928.
186. *See id.* at 908.

sequently, as the majority correctly pointed out, the cap does infringe upon the judiciary's right to remit an excessive damage award.

The majority also accurately distinguished the case of *Unzicker*, which dealt with altering the rules of joint and several liability.[187] In *Unzicker*, the General Assembly changed the previous rule of joint and several liability so that if the jury found a tortfeasor less than twenty-five percent liable, that tortfeasor would be severally liable only for that percent of the damage.[188] The changes, as the *Lebron* majority correctly stated, were not the equivalent of a numeric cap.[189] A cap requires that the court enter a judgment that "disagrees" with the jury's determination of damages (because the jury's award automatically gets reduced, regardless of the facts of the case, if it surpasses a certain number).[190] The altered rule of joint and several liability, on the other hand, still allows for a case-by-case analysis of "how liable" each defendant is. A jury, and not the legislature, makes the initial determination of a defendant's percentage of fault and the damage award will essentially match what the jury finds.

In addition, the changed rule at issue in *Unzicker* did not substantially affect the judiciary's right to order remittitur. The statute in *Unzicker* required the court to enter judgment in conformity with the jury's assessment of fault when the defendant was minimally responsible (less than twenty-five percent).[191] The jury's verdict in such a case will not be excessive, because the jury has to first determine that a tortfeasor is less than twenty five percent liable for the total amount of damages in order for the change to occur. In that sense, the court's right to remit the amount of damages (when that number is grossly excessive) will not be infringed. If the jury finds a tortfeasor more than twenty-five percent liable for the total amount of damages, the tortfeasor may then be liable for the full amount, but the court can still remit the verdict if it becomes excessive. The *Lebron* majority, then, properly concluded that Public Act 94-677 was distinct from the statute in *Unzicker*.

187. *Id.* at 910–911.

188. *See id.* at 910. Before the change, regardless of "how liable" the fact finder found a tortfeasor to be, a plaintiff could receive all of his damages from that defendant. *See id.*

189. *Id.* at 911.

190. *See id.*

191. *Id.* at 911.

2. Caps: Punitive Damages vs. Noneconomic Damages

The *Lebron* majority properly distinguished between capping noneconomic damages and capping punitive damages.[192] Part of this distinction reflects the difference between rights that the General Assembly has created and rights that have existed at the common law. The General Assembly may limit the maximum recovery for rights they have created.[193] The Illinois Supreme Court noted in *Wright* that when the legislature creates both the right and the remedy (as in the Wrongful Death Act), the legislature's power to limit the maximum recovery in the action that it created cannot be questioned.[194] In many causes of action that cap punitive damages, the legislature created, by statute, the right to recover. The right to recover for injuries arising from medical malpractice, on the other hand, existed at the common law.[195] Consequently, the legislature lacks the same authority to limit certain remedies for medical malpractice actions.

According to the Illinois Supreme Court, plaintiffs have no vested right to exemplary, punitive, vindictive or aggravated damages.[196] As the *Lebron* majority correctly noted, punitive damages are not given to recompense the individual (like noneconomic damages).[197] Rather, the legislature and the Illinois Supreme Court allow recovery of punitive damages in the interest of society.[198] More generally, punitive damages are often available for willful or intentional violations of a common law or statutory duty.[199] A court grants punitive damages to deter future misconduct or wrongdoing rather than to compensate the individual for actual wrong or damage that he suffered.[200] Acts that bar punitive damages, then, "merely establish a 'public policy' that in the interest of society in the particular class of cases such damages should not be awarded."[201]

192. *Id.* at 912.

193. *See Smith*, 147 N.E.2d at 325.

194. *Wright*, 347 N.E.2d at 742.

195. *Id.*

196. *See Smith*, 147 N.E.2d at 325.

197. *Lebron*, 930 N.E.2d at 912 (quoting *Smith*, 347 N.E.2d at 326-327).

198. *Id.*

199. *See generally* Majorie A. Shields, *Construction and Application of State Statutory Cap on Punitive Damages in Tort Cases Exclusive of Medical Malpractice Actions*, 8. A.L.R. 6th 439 (2005) (summarizing the basic theories of exemplary, punitive or vindictive damages).

200. *Id. See also* 15 ILL. LAW AND PRAC. DAMAGES § 56 (discussing the purposes for awarding punitive damages). For more information regarding caps on punitive damage awards, see also 103 A.L.R. 5th 379 (originally published in 2002) (discussing the validity of state statutory caps on punitive damages).

201. *Lebron*, 930 N.E.2d at 912, (quoting *Smith*, 147 N.E.2d at 326-327).

As a result, the legislature may restrict or deny the allowance of punitive damages.[202] In pragmatic terms, a jury may, in certain circumstances, "punish" the wrongdoer with punitive damages, but the injured plaintiff is not entitled to those damages in the same way the plaintiff is entitled to compensatory damages.[203] As the Illinois Supreme Court stated in *Smith*, denying punitive damages "cannot be said to deny any constitutional right or to encroach upon any judicial function" (such as the remittitur).[204] The fact that punitive damages are not tied to the severity of a plaintiff's injury, but rather to the culpability of the defendant's conduct, indicates that a state can cap them. The Court in *Lebron*, by striking down the cap on noneconomic damages, simply complied with its own precedent.

B. Lebron's Implications for the Future: the Innkeeper Protection Act, Contractual "Loopholes," and Alternative Solutions to Statutory Caps

1. Current Statutes Limiting Common Law Liability in Illinois

Illinois currently has several other statutes that limit common law liability. In *Lebron*, the defendants voiced their concern that these statutes could no longer survive if the court struck down Public Act 94-677.[205] The majority did not thoroughly address these arguments, merely stating that "none of the statutes defendants cite requires a court to reduce a jury's award of noneconomic damages to a predetermined limit, irrespective of the facts of the case."[206] However, an examination of such statutes reveals most of these enactments are safe from the kind of attack faced by Public Act 94-677.

Most of these statutes, as the *Lebron* majority pointed out, do not set numeric limits or caps for causes of action. The Good Samaritan Act, for example, exempts persons who give emergency telephone instructions from civil liability altogether, but does not set a cap.[207] Similarly, the Emergency Medical Services (EMS) Systems Act declares that any persons, agencies, or governmental bodies that provide emergency

202. *Id.*

203. *See* Wabash, St. Louis & Pac. Ry. Co. v. Rector, 104 Ill. 296, 303-304 (Ill. 1882).

204. *Smith*, 147 N.E.2d at 327.

205. *Lebron*, 930 N.E.2d at 913.

206. *Id.*

207. 745 ILL. COMP. STAT. ANN. 49/5 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Good Samaritan Act."

services in good faith shall not be civilly liable as a result of their acts unless such acts constitute willful and wanton misconduct.[208]

A third Act mentioned by the *Lebron* defendants, the Probation Community Service Act, eliminates negligence liability for organizations and individuals who agree to accept community service from offenders.[209] All of these statutes, then, simply eliminate certain causes of action completely rather than setting statutory damage limitations. Since the Illinois Supreme Court has differentiated between eliminating causes of action and setting statutory caps, these statutes appear to be "safe" from a separation of powers analysis; they do not interfere with the judicial right to remit excessive verdicts.[210]

One statute mentioned by the *Lebron* defendants that might be subject to scrutiny is the Innkeeper Protection Act.[211] The Act limits a hotel's liability for loss or damage to guest property.[212] If a hotel provides a safe or vault for valuables and provides notice to the guests that the vault exists, and if those guests fail to use the vault for their valuables, the hotel will not be liable for more than $250 in loss or damage to guests' property.[213] The statute also provides that this limit applies "regardless of whether such loss or damage is occasioned by theft, the fault or negligence of such proprietor or manager or of his agents."[214] The Act further states that if the guests do utilize the vault or safe for valuables, the hotel shall not be liable for more than $500 for loss or damage to the guest's property.[215] The final sentence of the Act, however, provides that the proprietor or manager of the hotel may enter into a "special agreement" in writing with the guest where the manager agrees to assume additional liability.[216]

208. 210 ILL. COMP. STAT. ANN. 50/3.150 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Emergency Medical Services (EMS) Systems Act."

209. 730 ILL. COMP. STAT. ANN. 115/1 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Probation Community Service Act."

210. This scope of this comment is limited to a potential separation of powers challenge to such statutes. The statutes limiting common law liability may nonetheless be subject to any of the following challenges (which were brought up in both *Best* and *Lebron*): equal protection, due process, right to trial by jury, and right to certain remedy.

211. 740 ILL. COMP. STAT. ANN. 90/1 (West through P.A. 96-1382 of the 2010 Reg. Sess). Also known as the "Innkeeper Protection Act."

212. *Id.*

213. *Id.* The Act states that the liability in such a case—when the hotel provides notice of the vault and the guest does not use it—is limited to liability that results from negligence or fault of the proprietor or manager. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

The Innkeeper Protection Act raised heated debate even before the *Lebron* case made it to the Illinois Supreme Court. The defendants previously argued that the Innkeeper Protection Act embodied proof that the General Assembly may limit common law liability with caps.[217] The *Lebron* majority disagreed, stating that the Innkeeper Protection Act does not parallel P. A. 94-677 because the last provision of the Innkeeper Protection Act allows parties to contract around the statutory limit.[218] While it is true that the Innkeeper Protection Act provides for such a "special agreement," the Act still sets statutory limits on liability.[219] Unlike the other statutes, which abolish causes of action altogether, the statutory cap in the Innkeeper Protection Act could affect the judiciary's power to remit.

The *Lebron* majority seemingly overlooked the fact that the cause of action against a hotel or "innkeeper" was not created by the General Assembly, like actions for Worker's Compensation. As such, the General Assembly does not possess the same power to limit the damages to be awarded; the General Assembly lacks unquestionable authority to limit remedies for causes of action established by the common law.[220] In addition, the cap in the Innkeeper Protection Act deals with compensatory damages, rather than punitive damages. Thus, the General Assembly cannot necessarily place a cap on the damage award and avoid constitutional scrutiny, because plaintiffs have a right to compensatory damages.[221]

The ability to contract around the statutory limit, then, may fail to save the Innkeeper Protection Act from judicial scrutiny, or at least from a separation of powers challenge. The numeric cap can still prevent the judiciary from remitting an excessive damage award given to the plaintiff in such a case. For example, imagine a scenario where a hotel guest foregoes the "special agreement" and presents his valuables to the hotel proprietor for placement in the vault. The hotel management then acts negligently and loses the valuables. Under the statute, the plaintiff in an ensuing lawsuit can recover only an amount up to $500.[222] Therefore, if the jury determines that the hotel is liable

217. Brief of Defendants-Appellants Gottlieb Mem'l Hosp. at 4–6, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

218. *Lebron*, 930 N.E.2d at 913.

219. *See* 740 ILL. COMP. STAT. ANN. 90/1.

220. *See Lebron*, 930 N.E.2d at 912. *See also Wright*, 347 N.E.2d at 741–742.

221. *Id.*

222. 740 ILL. COMP. STAT. ANN. 90/1. This cap limits only the amount recoverable from the hotel itself.

for any amount over $500, the judiciary has lost the ability to remit that award. Instead, the award automatically gets reduced to comply with the statute. If, on the other hand, the ability to contract around the statutory limit indicates that the legislature has not infringed upon the judiciary's sphere of authority in enacting the statute, this "contractual loophole" may stir up other theories about how to reform medical malpractice liability.

2. Contracting out of Liability: A Feasible Alternative to Statutory Caps?

The "special agreement" provision of the Innkeeper Protection Act allows the individual and the hotel proprietor or manager to contract around the statutory cap so that the hotel manager agrees to assume additional liability.[223] The Illinois Supreme Court has never addressed the constitutionality of the Innkeeper Protection Act. If the Act remains intact, the idea of a contractual loophole may present a viable option for those desiring medical malpractice liability reform. The theory of contracting out of medical malpractice liability is not new; both constitutional and tort law scholars have proposed ideas as extreme as replacing the tort-based medical malpractice liability system with one based on contract law.[224] However, even a brief exploration of this idea reveals that certain issues that might arise in its implementation.[225]

Richard Epstein is one of many prominent scholars who have advocated a conversion to contract-based liability for medical malpractice.[226] When it comes to reforming liability, Epstein believes that "the key error is to treat this as a *tort* problem when designing a governance regime calls for a contractual response."[227] He theorizes that a tort liability system makes sense when the plaintiff and defendant are strangers, because the tort system adopts a high standard of care in order to deter the harms one person causes another.[228] When physical injuries arise out of a consensual arrangement between a patient and a

223. *Id.*

224. *See generally* Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 U. PA. L. REV. 957 (2010).

225. This section of the comment focuses solely on the feasibility of adapting the current tort system to one based on, or implementing, contract law. This comment in no way concludes as to whether this type of system would be preferable to the one currently enacted.

226. *See generally* Richard A. Epstein, *Contractual Principle versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503 (2005).

227. *Id.* at 505.

228. *Id.* at 506.

doctor, however, the traditional system of tort liability is an imperfect match.[229]

For Epstein, the objectives of the individuals in the medical malpractice context are too different from the basic tort context; the goal of a patient "is not to keep a supplier or physician at bay" but rather "to maximize the joint gains from trade through the delivery and receipt of goods and services."[230] In the medical malpractice context, Epstein would prefer a contract-based system, where physicians are liable only to parties that have contracted for liability.[231] Essentially, patients would contract for the right to sue a doctor.[232]

Proponents of a contract-based system of medical malpractice liability claim that the reform can come in two ways: patients can contract individually with physicians, or patients could contract with their health care providers.[233] Generally, the patient would agree to waive the right to sue for negligence, and the physician or insurance carrier could offer that patient a lower price for health care.[234] Courts have previously disallowed waivers of medical malpractice liability by patients, declaring that they are against public policy.[235] Additionally, theorists recognize that "courts will block any deal between patients and providers that exchanges lower-cost treatment for a waiver of the patient's right to sue."[236] Nonetheless, proponents still urge for a contract based system, arguing that it would reduce medical malpractice liability costs in a way that still benefits patients.[237]

One potential problem that could arise in this context is the imposition of the traditional fiduciary duty that physicians owe to pa-

229. *Id.* at 507.

230. *Id.*

231. *Id.* at 509.

232. *Id.* Epstein also theorizes as to how this new system might look in practice. He believes that any new arrangements would involve a different standard of care, might restrict the use of *res ipsa loquitor*, could involve expedited arbitration procedures, and might even place some caps on damages. *Id.*

233. Arlen, *supra* note 224, at 960.

234. RICHARD A. THALER & CASS. R. SUNSTEIN, NUDGE 208–209 (2008).

235. *Id.* at 209.

236. *Id.* at 210.

237. *Id.* at 205–210. *See also* Duncan MacCourt & Joseph Bernstein, *Medical Error Reduction and Tort Reform Through Private, Contractually-Based Quality Medicine Societies*, 35 AM. J.L. & MED. 505 (2009); *Fixing Medical Malpractice Through Health Insurer Enterprise Liability*, 121 HARV. L. REV. 1192, 1193 (2008) (discussing medical malpractice reform and insurer enterprise liability). Other proposed alternatives to the current tort system for medical malpractice liability are a legislatively created system of special "health courts" to handle claims, insurer enterprise liability, and alternative dispute resolution.

tients.[238] Physicians generally have a duty to not take advantage of patients, because the physicians have higher bargaining power.[239] The better informed provider, the doctor, has the duty to act in the patient's best interests.[240] This duty already plays a large role in several aspects of the patient-doctor relationship, including fiduciary disclosure of risks and benefits of procedures.[241] With this understanding of fiduciary duty, one can see where problems might arise in a situation where a patient agrees to waive the right to sue for malpractice liability. Courts will likely find that a physician who creates a contract with a patient where the patient foregoes the right to sue for malpractice has breached his fiduciary duty.[242]

Regardless of other potential issues that could arise with a reformed malpractice liability system, the idea may present a way for the General Assembly to avoid the remittitur (and therefore separation of powers) analysis. The contractual loophole to a statutory cap might additionally be easier to implement than a complete state-imposed alteration of the medical malpractice liability system (from tort to contractual). One possible and important difference between the Innkeeper Protection Act and the methods discussed by proponents of reform, however, is that the "special agreement" in the Act allows the hotel proprietor to assume additional liability.[243] The advocates of reform, on the other hand, envision scenarios where the physician "gets out of" liability.[244] While this distinction may not matter in terms of a remittitur analysis, it would certainly raise concerns regarding patients' bargaining power and might seem contrary to public policy.

CONCLUSION

In *Lebron v. Gottlieb*, the Illinois Supreme Court made a definitive statement about statutory caps on noneconomic damages in medical malpractice lawsuits. Any future attempts to limit noneconomic dam-

238. Maxwell J. Mehlman, *Fiduciary Contracting Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 366-367 (1990).

239. *Id.* at 390.

240. *Id.*

241. *Id.* at 391-393.

242. As Mehlman points out, at least one case has ruled that, as a matter of law, a patient can waive the right to sue a provider for malpractice. *See* Schneider v. Revici, 817 F.2d 987 (2d Cir. 1987) (court ruled that patient Schneider was barred from suing for malpractice liability because she had waived the right to complain that the defendant physician used an unorthodox procedure for her breast augmentation).

243. 740 ILL. COMP. STAT. ANN. 90/1.

244. *See* THALER & SUNSTEIN, *supra* note 234, at 208-209.

ages in medical malpractice cases will meet a roadblock in the form of a separation of powers challenge. The *Lebron* majority accurately distinguished between certain actions and caps, and complied with its own precedent, when overturning Public Act 94-677. *Lebron*'s reliance on remittitur, despite receiving criticism, also signifies that the Illinois Supreme Court will not address the constitutionality of the remittitur doctrine in the future.

The Illinois Supreme Court has now made several important distinctions regarding the power of the General Assembly and the remittitur. When the General Assembly has created the right and the remedy for a cause of action, it may limit the remedy for the cause of action with a statutory cap.[245] The General Assembly may also cap punitive damage awards in any cause of action, because the plaintiff has no vested right in punitive damages the same way a plaintiff has a right to compensatory damages.[246] Finally, the General Assembly may abolish a cause of action, whether created by statute or derived from the common law, without implicating the remittitur doctrine.

The majority of the currently enacted statutes in Illinois which limit common law liability will be relatively unaffected by the *Lebron* decision. These statutes generally abolish causes of actions altogether, rather than setting statutory caps,[247] and will therefore be exempt from the same separation of powers analysis. The only statute which might receive future attention is the Innkeeper Protection Act, because it does set a monetary limit for a damage award against a hotel.[248] The potential "saving grace" for the Act remains in the fact that parties may contract around the statutory limit.[249] The idea of contracting around or out of a statutory cap could represent a feasible solution for those wishing to reform medical malpractice liability.

Proponents of such reform, which would allow individuals to contract with either their physicians or their health care insurers, believe that it would solve many of the economic problems that exist in the current liability system.[250] The system would transform into one consisting of default rules, and patients who want to contract out of those rules (and therefore contract for the right to sue a doctor) must take

245. *See Lebron*, 930 N.E.2d at 912.
246. *Id.*, quoting *Smith*, 147 N.E.2d at 326-327.
247. *See supra* notes 207-211.
248. 740 ILL. COMP. STAT. ANN. 90/1.
249. *Id.*
250. *See* THALER & SUNSTEIN, *supra* note 234, at 205-210.

the initiative to do so.[251] Such a theory sounds simple enough, but research shows that the rules of fiduciary duty might interfere with the imposition of contract-based liability.[252] Nonetheless, those frustrated with the Illinois Supreme Court's decision in *Lebron* may have discovered a viable way to reform medical malpractice without implicating the remittitur.

251. *Id.* at 208–209.
252. *See* Mehlman, *supra* note 238, at 366.